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Human Trafficking: Legal Issues in Presumed Consent Laws

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Human Trafficking: Legal Issues in Presumed Consent Laws[†]

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A medically invented, artificial scarcity in human organs for transplantation has generated a kind of panic and a desperate international search for them and for new surgical possibilities . . . [Those] looking for transplant organs are so single minded in their quest that they are sometimes willing to

[†] I would like to thank Sheila M. Rothman and David J. Rothman for inspiring this article and providing the background for International Community Stories and Organ Harvesting in their article, *The Organ Market*, 51 THE N.Y. REV. OF BOOKS, Oct. 23, 2003.

put aside questions about how the organ was obtained. In both instances the language of 'gifts,' 'donations,' 'heroic rescues,' and 'saving lives' masks the extent to which ethically dubious and even illegal practices are used to obtain the desired 'scarce' commodity, or kidney, for which foreigners are willing to pay what to ordinary people seems a king's ransom. With desperation built in on both sides of the equation – deathly ill 'buyers' and desperately needy 'sellers' – once seemingly 'timeless' religious beliefs in the sanctity of the body and proscriptions against body mutilation have collapsed over night in some parts of the third world under the weight of these new market's demands.¹

I. Introduction

Poverty oppresses the rural inhabitants of many third world countries, and the resulting desperation sometimes leads young men and women in these countries to sell their body parts. A saber-like scar marks the abdomens of as many as 14 out of 40 young people in the rural towns of India and South East Asia.² It is a symbol of either ultimate liberty or devastating exploitation. Generally, the donor is a young man between the age of 18 and 28 who sells his kidney for \$2,000-\$3,000. The recipient pays \$250,000 per transplant.³ The surplus goes to international organized crime and the doctors who make the transplants. In a thriving underground market, "the circulation of kidneys follows established routes of capital from South to North, from East to West, from poorer to more affluent bodies, from black and brown bodies to white ones, and from female to male or from poor, low status men to more affluent men."⁴ Despite its illegality in almost every country, organ trafficking persists because the poverty of

¹ Nancy Scheper-Hughes, *The End of the Body: The Global Traffic in Organs for Transplant Surgery*, Department of Anthropology University of California, Berkeley (May 14, 1998), available at <http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html> (last visited Jan. 20, 2005).

² Suz Redfearn, *Don't Bank Your Health on Organ Sale*, THE WASH. POST, Oct. 22, 2002, at F3.

³ Eugene Tomiuc, *Eastern Traffic: 'An Attack on Human Dignity' – Council of Europe Decries Organ Trafficking*, Radio Free Europe/Radio Liberty, at <http://www.rferl.org/features/2003/06/25062003162809.asp> (last visited Jan. 20, 2005).

⁴ Nancy Scheper-Hughes, *Keeping An Eye On the Global Traffic In Human Organs*, 361 THE LANCET 1645, 1645 (2003).

potential donors, endless waitlists, and better quality of organs harvested from live donors make organ commerce an irresistible trade.⁵ The coordinator of kidney transplantation at Hadassah University Hospital in Jerusalem estimates that “60 of the 244 patients currently receiving post-transplant care purchased their new kidney from a stranger – just short of 25% of the patients at one of Israel’s largest medical centers participating in the organ business.”⁶

Although organ trade is prohibited by national and international transplant societies as well as by the World Medical Association (WMA), their rules are rarely enforced.⁷ The WMA formally espouses that, “[p]ayment for organs and tissues for donation and transplantation should be prohibited. A financial incentive compromises the voluntariness of the choice Organs suspected to have been obtained through commercial transaction should not be accepted for transplantation.”⁸ The WMA, however, neither has nor seeks the authority to discipline. It merely provides “guidance to medical associations, physicians, and other health care providers.”⁹ Desperate buyers and sellers who are dealing in life and death transactions rarely follow such guidance. As a result, there is no effective international regulation.

The current paradigm presents the worst-case scenario. Due to an insurmountable organ shortage, a black market exploits the socially invisible and helpless. To continue on the current course is to allow unacceptable exploitation. International collaboration is required to develop a common strategy to stop the trafficking of human organs. This Comment examines international and U.S. attitudes towards organ harvesting with the objectives of achieving

⁵ In Bosnia-Herzegovina, sellers offer their organs through newspaper advertisements where a kidney may claim \$68,000 compared to the average monthly wage of less than \$200. *Bosnians Forced to Sell Kidneys to Survive*, Serbian Unity Congress (Jan. 2002), available at http://news.serbianunity.net/bydate/2002/January_22/7.html (last visited Jan. 20, 2005).

⁶ Michael Finkel, *Complications*, N.Y. TIMES MAG., May 26, 2001, at 26.

⁷ Sheila M. Rothman & David J. Rothman, *The Organ Market*, 51 THE N.Y. REV. BOOKS, Oct. 23, 2003, at 49-50.

⁸ World Medical Association, *Statement on Human Organ & Tissue Donation and Transplantation*, at <http://www.wma.net/e/policy/wma.htm> (last visited Jan. 20, 2005).

⁹ *Id.* para. 1.

a more unified front to increase organ availability and curb exploitation in third world countries. Part II describes the various organ harvesting policies in third world countries, using Thailand, Singapore, and the Philippines as concrete examples of a much broader problem. Part III discusses the history and law of organ procurement in the United States, which construes organs as gifts which may be freely given or withheld. This Comment questions the sufficiency of this scheme in light of alternatives, such as a system of presumed consent, which are arguably more effective in increasing organ supply. For a number of reasons, presumed consent does not have public support in the United States, which may be rooted in notions of privacy and property law. Next, Part IV examines the development of property and privacy law as it pertains to the human body. Finally, Part V concludes that presumed consent is not only a preferable system of donation which is constitutionally sound, but it is much less intrusive than many laws enacted in comparable situations. On an international level, there needs to be a concerted effort to increase supply of organs and apply rules evenhandedly. One solution may be presumed consent, a policy in line with national and international laws.

II. International Community Stories and Organ Harvesting

Thailand, Singapore, and the Philippines serve as useful illustrations of the varied approaches taken by third world countries to Organ Harvesting. The following discussion of the economic and structural conditions affecting organ harvesting in these countries illustrates the ways in which these factors, present in most third world countries, contribute to situations in which organs are being harvested unethically.

A. Financial Corruption in Thailand

Even in countries where organ harvesting is illegal, incentives to profit from organ transplantation corrupt hospital policy. For religious or merely superstitious reasons, Thai families are averse to organ donation and will not allow surgeons to remove organs before cremation.¹⁰ Therefore, the waiting list for a transplant is long. Due to a fairly wealthy population, hospitals and surgeons

¹⁰ Rothman & Rothman, *supra* note 7, at 49.

are in a position to make large profits if they can find available organs. Thailand has two health care systems. One is characterized by dirty and overcrowded public hospitals; the other is comprised of lavish, state of the art, private hospitals.¹¹

The private profit-seeking hospitals are centers for medical tourism and maintain some of the best facilities in the world.¹² Some private hospitals are unwilling to help accident victims because they are too poor to pay the bill.¹³ Other private hospitals engage in a more aggressive cost-benefit analysis: “[I]f they admit traffic victims who then die, and if their families are willing to donate their organs, the hospital would then have two kidneys available for transplant into two patients able to afford the \$10,000 cost of an operation that would cost about \$100,000 in the United States.”¹⁴ Bangkok’s Vachiraprakarn General Hospital (VGH) adopted this policy. In spring of 2002, a transplant surgeon persuaded the family of a comatose pregnant woman to transfer her from a rural hospital to VGH, after promising to provide “free” medical care.¹⁵ The family then signed a consent form, which authorized the removal of the woman’s kidneys if she died.¹⁶ Following her death, the family received a \$2,500 payment for “funeral expenses.”¹⁷ The surgeon removed the woman’s kidneys, transplanted them into two patients, and charged each patient for the full amount of the surgery and their “gifts.”¹⁸ As calculated, for an expenditure of \$2,500, the surgeon made \$25,000.¹⁹ VGH was investigated when rumors emerged that the woman had not been brain dead upon the removal of her organs.²⁰

The Thai Medical Council investigated the allegations and found that VGH has consistently violated laws prohibiting the sale

¹¹ *Id.* at 50.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

of organs.²¹ The hospital had a longstanding practice of transplanting kidneys from living donors who are not related to the recipient, making substantial payments to families for agreeing to a donation, and then charging the recipients of the organs the full costs of the payment. As a general practice, VGH bribed people in other hospitals to transfer patients near death to VGH and paid ambulance drivers to bring near critically injured patients to its emergency room.²² Though Thailand has active medical and legal authorities, they only respond to complaints; they do not initiate investigations.²³ Surgeons and administrators remain free to cut their own deals in the organ market.

B. Systemic Bias in Singapore

In 1987, Singapore enacted the Human Organ Transplant Act (HOTA), which states that the kidneys of all non-Muslim citizens and permanent residents between twenty-one and sixty who die in accidents shall be used for transplantation unless one has opted out.²⁴ To "opt out" of the system, one must sign a card that says, "I hereby object to the removal of my kidneys upon my death for transplantation," and then send the card to the Organ Donor Registry.²⁵ There are several noteworthy qualifications to the Act. First, the law restricts presumed consent to road accidents so that terminally ill patients and the elderly do not fear that their doctors have ulterior motives, such as obtaining their kidneys.²⁶ Second, HOTA only applies to kidneys and not the heart, which Singaporeans consider to be the most sacred organ.²⁷ And, third, the law does not extend to Muslims, including the ethnic Malays, who make up 15% of Singapore's population.²⁸

A point system governs the national transplant waitlist.²⁹ At the top of the list, non-Muslim citizens with point tallies around

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

forty or fifty are eligible to receive an organ.³⁰ Severity of illness, age, and social criteria add points. Muslims, on the other hand, start with a negative sixty points.³¹ The government explains that, traditionally, Muslims have a track record of opting out of the system. Therefore, Muslims are penalized because they have not been as giving as the rest of the population and, thus, should not receive the benefits.³² No one else, however, in Singapore who opts out is treated this way. Furthermore, no other country has ever penalized people who are not organ donors.³³ In Singapore, the organ registry is arguably a method of institutionalizing discrimination.

C. Poverty and Exploitation in the Philippines

Bioethical arguments about the right to buy or sell an organ are based on Western notions of contract and individual choice.³⁴ Yet, in the United States, organs are construed as gifts for social policy reasons. The United States does not believe people should have the choice to sell their organs. "We may freely withhold or freely give them, but we may not sell them, nor claim them for others as a matter of right."³⁵ Since demand will continue to escalate, the only way to close the gap between organ need and availability is to increase supply. Proponents of a legal market argue that people respond to monetary incentives. Based on market incentives, people will sell their kidneys, increase the supply of the scarce and highly valuable resource, and create a "win-win" situation for the donor and recipient. The Philippines is one region where the freedom of contract hypothesis is tested in reality.

In the Philippines, kidneys are legally purchased on an open market. Medical teams go into the poor areas, perform blood and tissue tests on the inhabitants, and store the results. When a recipient arrives for a transplant, an organ broker reviews the

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Scheper-Hughes, *supra* note 4.

³⁵ James Lindermann Nelson, *Do We All Have a Responsibility to Donate Our Organs?* THE ETHICS OF ORGAN TRANSPLANTATION 48 (John Balint & Wayne Shelton eds., 2001).

stored results, finds a donor based on these results, arranges a pairing, and a surgeon performs the transplant. The practice is defended as a matter of free choice. A group of American physicians and bioethicists concur, arguing that since we cannot rid the world of poverty, the choice to sell a kidney is the "best option poverty has left."³⁶

Empirical evidence, however, weakens this theoretical argument. When asked about their health and economic condition, Filipinos who had sold their kidneys complained of pains and disabilities for which they could not afford medical treatment.³⁷ They were also further in debt. Before the surgery, many had worked at loading ships on the docks. After the surgery, they were no longer able to do heavy lifting or had been fired due to the stigma associated with infirmity. "Decisions to sell a kidney appear to have less to do with raising cash toward some current or future goal than with paying off a high interest debt to local moneylenders."³⁸ It has even been suggested that once a region is reputed to be a source for kidneys, "brokers intensify their search for sellers there; creditors then become more aggressive in calling in debts, and relatives of patients become still more reluctant to donate a kidney when they can buy one."³⁹ Some ethicists have concluded that this freedom of contract is really a "false liberty."⁴⁰ "The choice to sell a kidney in an urban slum of Calcutta or in a Brazilian favela, or a Philippine shantytown is often anything but a free and autonomous one."⁴¹

³⁶ J. Radcliff-Richards, *The Case for Allowing Kidney Sales*, 351 THE LANCET 1950-1952 (1998), available at http://emlab.berkeley.edu/users/webfac/held/157_VIII.pdf (last visited Jan. 20, 2005).

³⁷ Rothman & Rothman, *supra* note 7, at 51.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ David Rothman, *Ethical and Social Consequences of Selling a Kidney*, 288 JAMA 1641 (2002). "Nobel Prize winner Amartya Sen has argued, economic development is too easily subverted by notions of 'false liberty,' the kind implicit in the so called right to sell a kidney." *Id.*

⁴¹ Nancy Scheper-Hughes, *The Global Traffic in Human Organs: A Report Presented to the House Subcomm. on Int'l. Operations and Human Rights, United States Congress* (June 27, 2001), available at <http://www.publicanthropology.org/TimesPast/Scheper-Hughes.htm> (last visited Jan. 20, 2005).

III. U.S. Law and Policy Towards Organ Harvesting

In stark contrast to the systems in place in Thailand, Singapore, and the Philippines, the U.S. approach to organ harvesting is highly restrictive. Despite their differences, however, all of these systems present problems that may be equally problematic on an ethical level. In third world countries, the problem is the presence of systems that lead to unethical harvesting of organs. In the United States, the problem is the presence of a system that discourages any organ harvesting whatsoever.

In December 2003, there were 83,686 people on the organ waiting list in the United States.⁴² Last year, 6,187 Americans died while waiting for organs.⁴³ This Comment argues that rather than creating a situation in which the need for organs is being met, the system in the United States actually creates critical levels of organ shortages.

Furthermore, the situation will worsen before it improves. As medical science continues to advance, the demand for organs will increase because organ transplantation is the best treatment and only hope for many people suffering from end-stage disease.⁴⁴ "The life saving potential of organ transplantation is limited only by a shortage of organ donors,"⁴⁵ which is perpetuated by the inefficiency of national law and policy in organ transplantation.

A. Federal Law

In 1984, Congress passed the National Organ Transplant Act (NOTA),⁴⁶ which makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration⁴⁷ for use in human transplantation if the

⁴² Erika L. Rager, *The Donation of Human Organs and the Evolving Capacity for Transplantation: Exciting Developments and Future Prospects*, 65 N.C. MED. J. 18, 18 (2004).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 42 U.S.C. § 274(e) (2002).

⁴⁷ "Valuable consideration" excludes "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing and lost wages incurred by

transfer affects interstate commerce.”⁴⁸ NOTA established the Organ Procurement and Transplantation Network. The legislative history of NOTA is sparse, but the underlying message is clear. The Senate Labor and Human Resources Committee stated plainly, “individuals or organizations should not profit by the sale of human organs for transplantation.”⁴⁹ Likewise, the Task Force on Organ Transport concluded, “society’s moral values militate against rendering the body as a commodity.”⁵⁰ NOTA is limited to interstate commerce, so the task force encouraged states to create their own laws.

B. State Law

As the viability of organ transplantation became a reality, the process for donation was standardized, and the prohibition on sale was codified. The National Conference of Commissioners on Uniform State Laws approved the UAGA in August 1968 (1968 UAGA).⁵¹ By 1973, all fifty states had adopted the Act or some variation.⁵² The UAGA proclaims that individuals possess the right to donate their bodies and body parts after death for the purposes of transplantation, therapy, research, or education.⁵³ The 1968 UAGA authorizes a living person to make a gift of all or part of his body after death by means of a will or the execution of a document signed by the donor in the presence of two witnesses.⁵⁴ In the absence of a will or other document manifesting the decedent’s intent, the 1968 UAGA grants close relatives the power to donate their loved one’s body after death as long as there is no

the donor of a human organ in connection with the donation of the organ.” *Id.* § 274 (e)(c)(2).

⁴⁸ *Id.* § 274(e)(b). The Act authorizes criminal fines of as much as \$50,000 or imprisonment up to five years for any violation. *Id.*

⁴⁹ Senate Report accompanying the 1984 National Organ Transplant Act [Taken from U.S. Cong. Serial Set No. 13557, S. Rep. 98-382 (98th Congress, 2nd Sess)] available at <http://www.pitt.edu/~htk/1984report.htm>.

⁵⁰ See REPORT OF THE TASK FORCE ON ORGAN TRANSPLANTATION, ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 96 (1986).

⁵¹ Unif. Anatomical Gift Act § 1 (1968).

⁵² See *id.*

⁵³ *Id.* § 3(1).

⁵⁴ *Id.* §§ 4 (a)-(b).

actual notice of contrary indications by the decedent.⁵⁵

In 1987, the National Conference of Commissioners on Uniform State Laws passed an amended version of the UAGA (1987 UAGA), which was subsequently adopted in whole or in part by twenty-two states.⁵⁶ The 1987 UAGA differs from its predecessor in two important ways. First, the 1968 UAGA failed to encourage a sufficient supply of organs.⁵⁷ One major obstacle was the proscription that cadaveric organs could not be donated unless explicit authorization for their removal was obtained.⁵⁸ The 1987 UAGA reverses this presumption and allows the removal without express consent as long as "reasonable efforts" have been made to notify the appropriate persons and obtain their consent to donation, and the coroner is not aware of a refusal or contrary indication by the decedent or his family.⁵⁹ While placing the burden on the objecting donor is a step towards increasing supply, the majority of states have taken no action to reduce the consent requirement and still adhere to the 1968 UAGA.⁶⁰ Second, while the 1968 UAGA was silent on the issue of organ sales, the 1987 UAGA was amended to prohibit the purchase and sale of organs if removal of the organ is intended to occur after death.⁶¹ Like the NOTA, the 1987 UAGA also authorizes fines of up to \$50,000 or imprisonment for up to five years for any violation.⁶²

C. Structure of the National Organ Procurement and Transplantation System

In the United States, a network of organizations work in tandem to identify potential donors, allocate organs, and perform the transplantation. NOTA created the National Organ

⁵⁵ *Id.* § 2(b).

⁵⁶ Unif. Anatomical Gift Act § 4 (1987).

⁵⁷ Erik S. Jaffe, *She's Got Bette Davis's Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 535 (1990).

⁵⁸ *Id.*

⁵⁹ *Id.* at 537.

⁶⁰ *Id.* at 538.

⁶¹ See Unif. Anatomical Gift Act § 2 (1968) & Unif. Anatomical Gift Act § 2 (1987).

⁶² 42 U.S.C. § 274(e)(a)(2000).

Procurement and Transplantation System (OPTN) to facilitate organ matching.⁶³ The Act called for a unified transplant network to be operated by a private, non-profit organization under federal contract.⁶⁴ The United Network for Organ Sharing (UNOS) is the private, nonprofit organization that contracts with the federal government to administer the OPTN.⁶⁵ A centralized computer network at the UNOS Organ Center links Organ Procurement Centers (OPOs) and transplant centers. All patients on the transplant waiting list are registered with UNOS. The OPTN has two primary goals: "[t]o increase the effectiveness and efficiency or organ sharing and equity in the national system of organ allocation; and, to increase the supply of donated organs available for transplantation."⁶⁶ In order to receive Medicare funds, all transplant centers and OPOs must be members of OPTN.⁶⁷

OPOs are private, nonprofit organizations that are members of the OPTN.⁶⁸ Each OPO has its own board of directors and medical director on staff.⁶⁹ OPOs employ procurement coordinators, who coordinate each step of the transplantation process from evaluating potential donors, to obtaining consent from the donor's family, to placing the organs and traveling with the procurement team to obtain the organs.⁷⁰ The OPOs also strive to promote organ donation within communities.⁷¹ They engage in public and professional education efforts in the hospitals and communities they serve.⁷²

D. Transplant Process

When a patient needs a new organ, the potential recipient's

⁶³ The Organ Procurement and Transplantation Network, at <http://www.optn.org/optn> (last visited Jan. 20, 2005).

⁶⁴ *Id.*

⁶⁵ United Network for Organ Sharing, at <http://www.unos.org/whoweare> (last visited Jan. 20, 2005).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

name and medical information are entered into a computer database at the UNOS Organ Center.⁷³ The donor process begins when a local OPO is contacted by a hospital caring for a patient with impending brain death.⁷⁴ Most organs are procured from donors who have sustained brain death under circumstances that allow their respiration and circulation to continue to be supported by artificial means. In 1980, the Uniform Law Commissioners promulgated the Uniform Determination of Death Act, which declared that “[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.”⁷⁵ Timely determination of brain death is important to protect the condition of the donor’s organs.

After the declaration of brain death, the donor OPO performs a medical evaluation and contacts the patient’s family to discuss organ donation.⁷⁶ If the family agrees to donation, the procurement coordinator from the OPO contacts the UNOS Organ Center to begin the process of organ replacement.⁷⁷ Each time a donor becomes available, the UNOS computer compares characteristics of the donor with each individual waiting for that type of organ.⁷⁸ The database generates a list of potential organ recipients, ranked in order based on characteristics such as blood type, size, medical urgency, waiting time, and location.⁷⁹ Factors such as race, religion, gender, and financial status do not enter into the equation.⁸⁰ Once the match list is available, the procurement coordinator contacts the transplant team caring for the patient at the top of the list.

In general, organs first are offered to patients awaiting transplant within the OPO in which the organs were donated.⁸¹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Unif. Determination of Death Act § 1 (1996).

⁷⁶ See Rager, *supra* note 42, at 21.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

They are then offered regionally and nationally.⁸² The accepting transplant teams travel to the donor's hospital where the procurement operation takes place.⁸³ UNOS functions as the middle-man between the donor OPO and the receiving OPO.⁸⁴ From the time consent of organ donation is obtained, all costs incurred in the donation process are billed to the OPO.⁸⁵

E. Policy Options

The biggest obstacle for the transplant community is scarcity of organs. A number of options for increasing supply exist. Recognizing that the creation of an organ market is one such option, some members of the legal and medical community are attacking NOTA's prohibition on the sale or purchase of human organs. Their approach is to advocate alternatives to the prohibition, such as providing an ethically acceptable financial incentive to the beneficiaries of a decedent that may motivate an individual to formally express his intentions about donation prior to his or her death.⁸⁶ The sale of human organs, however, whether from a living person or a cadaver, is against the law in virtually every country and has been condemned by all of the world's medical associations.⁸⁷ So, while some medical professionals and ethicists are currently debating the possibility of compensation for organ donors, a market in body parts is a highly controversial shift in policy that violates current U.S. law and International Protocols.

Another option for increasing organ supply includes policy changes involving mandated choice or presumed consent. These policy changes offer a more viable, unified, and accepted way of increasing available organs, especially when compared to the creation of an organ market. Increasing consent rate among potential donors would significantly increase the number of organs available. "In fact, if all potential donors became actual donors,

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Charles A. Erin & John Harris, *An Ethical Market in Human Organs*, 29 J. MED. ETHICS 137-138 (2003), available at <http://jme.bmjournals.com/cgi/content/full/29/3/137>.

⁸⁷ Finkel, *supra* note 6.

there would be enough hearts and kidneys available to transplant each person added to the list in 2002.”⁸⁸

Within the consent framework, there are two options: mandated choice and presumed consent. Mandated choice is a system that requires adults to decide whether they wish to donate their organs when they die.⁸⁹ The decision would most logically be required when obtaining a driver’s license. Part of the problem with deciphering an individual’s intent to donate his or her organs is that most people do not discuss organ donation with family members because mortality is a difficult and unpleasant topic of conversation.⁹⁰ Under a system of mandated choice, each person is forced to consider the issue and make a decision.⁹¹ The individual’s decision is then honored at the time of death.⁹²

In a Gallup Poll conducted in 1993, only 30% of those surveyed had signed organ donor cards.⁹³ When polled to see if those surveyed would enlist to donate if mandated choice became the law, 63% said they would enlist.⁹⁴ The survey implicitly found that the more one thinks about organ donation, the more likely he or she is to donate. Of the 25% who said they had previously given organ donation serious consideration, 76% said that they would donate their organs.⁹⁵ Based on the results of this survey, mandated choice would increase the number of available organs.

Presumed consent offers an alternative where citizens are presumed to consent to donation unless they explicitly state they do not want to be donors. The current donor system in the U.S. is an “opt-in” system which depends on “a patchwork of organ donor card, driver’s licenses, advanced directives, and durable power of

⁸⁸ Rager, *supra* note 42, at 22 (citing Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 N. ENGL. J. MED. 667-74 (2003)).

⁸⁹ *Id.* at 23.

⁹⁰ See, e.g., *Mandated Choice and Presumed Consent for Cadaveric Organ Donation*, 272 JAMA 809-12 (Sept. 14, 1994), available at http://www.ama-assn.org/ama/upload/mm/369/ceja_report_055.pdf (last visited Jan. 20, 2005).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Rager, *supra* note 42, at 23 (citing A. Spita, *Mandated choice: A Plan to Increase Public Commitment to Organ Donation*, 273 JAMA 504, 504-506 (1995)).

⁹⁴ *Id.*

⁹⁵ *Id.*

attorney for healthcare statements as vehicles for citizens to state their wishes."⁹⁶ The opt-in system depends on the referral of all potentially medically eligible donors to the local OPO.⁹⁷ The OPO then initiates contact with the patient's family regarding donation.⁹⁸ The OPO tries to determine the "patient's wishes from documentation and discussions with family."⁹⁹ Yet, even if the potential donor indicated his or her wish to donate, the family must also consent.¹⁰⁰

In contrast to what normally happens, 82% of Americans believe that the individual, rather than his or her family should make the decision regarding organ donation.¹⁰¹ Fifty-eight percent of Americans were unsure about their own plans to donate.¹⁰² Only 38% had discussed their plans with their families.¹⁰³ Most of the time, families are making the organ donation decision under stressful circumstances and do not know whether the decedent intended to donate. The natural inclination is to use the default rule. The default rule in the U.S. is not to donate organs. In contrast, many European countries operate a presumed consent system.¹⁰⁴ In Belgium, for example, a national database tracks those who have opted out, and presumed consent has led to an increase in the number of available organs.¹⁰⁵ In Belgium, less than 2% of the population opts out of the system.¹⁰⁶

IV. Is Ownership of Our Bodies a Liberty or a Property Right?

The current organ crisis in the United States suggests that NOTA and UAGA result in market failure. The shortage of organs for transplantation results in a tragic number of potentially

⁹⁶ *Id.* at 22.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing Spita, *supra* note 93, at 504-06).

¹⁰¹ *Id.*

¹⁰² *Id.* Of those who had thought about the issue, 30% intended to donate and 12% intended not to donate. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 23.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

preventable deaths. Organs are retrieved from only 15-20% of the 15,000 to 20,000 eligible donors each year and increased efforts to encourage organ donation would save many more lives.¹⁰⁷ This Comment argues that an organ procurement system based on presumed consent would help to eliminate the gap between organ supply and demand. The nations with the highest per capita organ donation rates in the world all operate under presumed consent laws.¹⁰⁸ Commentators have warned that the political prospect for enacting presumed consent laws in the U.S. is bleak.¹⁰⁹ In addition, the public's lack of support for presumed consent is grounded in legal concepts of privacy and property as they relate to the human body. This Part discusses individual autonomy and the freedom from government intervention as it relates to the human body and questions the underlying premise that we own

¹⁰⁷ *Mandated Choice and Presumed Consent for Cadaveric Organ Donation*, 272(10) JAMA 809-812 (1994.)

¹⁰⁸ Austria, Spain, Portugal, Italy, Belgium, Bulgaria, France, Luxembourg, Norway, Denmark, Finland, Sweden, Switzerland, Latvia, Czech Republic, Slovak Republic, Hungary, Slovenia, Poland, Greece, and Singapore all have presumed consent. The opt-out rate is approximately 2%. See Presumed Consent Foundation, <http://www.presumedconsent.org/solutions.htm> (last visited Feb. 16, 2005).

¹⁰⁹ One source notes:

There are some enormous hurdles facing any attempt to promote presumed consent laws in the US. Unlike nations such as Austria, France, and Belgium, citizens of the United States tend to be far more distrustful of doctors and of central governments. While it is true that opinion polls constantly show a majority saying they want to serve as organ donors, it is also the case that there are significant numbers of Americans who do not want to do so on religious or personal grounds. The desire to protect minority views runs very strong in American culture, and it is highly unlikely that legislators would pursue a policy that could not guarantee that there would be no errors in utilizing persons as donors who did not wish to so serve. Add to that the current distrust of managed care and concerns about what will happen to people who lack health insurance when they become seriously ill or injured. The reality is that the political prospect for enacting presumed consent laws in this country is not good. While there is no ethical reason to prefer an opt-in system such as the U.S. now uses with its donor cards or an opt-out system of the sort used in Belgium and Spain with computerized lists of those who don't want to be organ donors, there is not much reason for political optimism that presumed consent is going to go far in state legislatures anytime soon.

Arthur L. Caplan & Sheldon Zink, *Is Presumed Consent the Answer to Closing the Organ Availability Gap?*, at <http://www.ikidney.com/iKidney/InfoCenter/Nephrology/Incite/Archive/PresumedConsent09.htm> (last visited Jan. 20, 2005).

our bodies.

A. *Competing Rights of Privacy and Property*

The future of organ transplantation is uncertain. While competing scholars arrive at different answers, the question remains clear, "Do we own our bodies, and do they, if ever, belong to someone else who needs them?"¹¹⁰ Imagine, for instance, a hypothetical lawsuit where a person needs a new kidney in order to live. The most suitable donor declines to contribute the kidney. A lawsuit is brought, and the would-be recipient seeks an injunction requiring the would-be donor to donate his kidney. While alive, the donor defends under the Fourteenth Amendment right to privacy. Privacy law guarantees a zone of freedom under the Fourteenth Amendment that protects certain liberties so fundamental and intimate to individual autonomy that government intrusion is unwarranted.¹¹¹ Framed as a privacy issue, government invasions of the body are unconstitutional unless narrowly tailored to serve a compelling interest.¹¹² In the hypothetical presented, the Fourteenth Amendment would almost certainly protect the donor's right to refuse the invasive medical operation even if it means the loss of a life that could have been saved.

How does the foregoing analysis change when the donor is dead and property law replaces privacy law? Conceptually, property is a bundle of rights, including the right to "possess, use, exclude, profit and dispose."¹¹³ Under the Due Process Clause of the Fourteenth Amendment, deprivations of property are constitutional if rationally related to a legitimate state interest.¹¹⁴

¹¹⁰ Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113 (2003).

¹¹¹ See, e.g., *Griswold v. Conn.*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 428 (1972).

¹¹² "Where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 114 (1973).

¹¹³ *United States v. Frost*, 125 F. 3d 346, 367 (6th Cir. 1997).

¹¹⁴ In cases where government action impairs non-fundamental rights (most economic and social welfare regulation), the court applies a rational basis test. Legislation is presumed to be valid and will be sustained if the classification drawn by

Furthermore, property can be taken from one person and reassigned to another upon payment of compensation; privacy cannot.¹¹⁵ U.S. law has evolved so that privacy protects life and property law applies in death. When the subject is invasion of the human body, under property theory, the state possesses the power to extract the decedent's organs for any public purpose, so long as it provides him or her with just compensation.¹¹⁶

B. Life and Privacy

There is an intuitive and constitutional difference between extracting an organ from a living human being and taking an organ from a dead body. Most people are repulsed by the idea of forced organ removal during life. An intuitive response would be, "Not *my* body," which belies a sense of ownership as well as privacy. This part describes the general legal consensus that an individual is protected by privacy rights during life. Even during an individual's life, however, the right to live free from government intrusion is not absolute, and there are clear exceptions to individual autonomy. Discussing several ways in which government interests override individual autonomy, this portion of the Comment argues that organ extraction during life is *conceivable*. This section does not argue that living organ extraction is *preferable*. The goal is to acknowledge that such a system is possible under existing law, especially in light of abortion law.

1. No Duty Rule

In *McFall v. Shrimp*,¹¹⁷ the Pennsylvania court posed the following question, "In order to save the life of one of its members by the only means available, may society infringe upon one's absolute right to his 'bodily security'?"¹¹⁸ In this case, the plaintiff, McFall, suffered a rare bone marrow disease and faced certain

the statute is rationally related to a legitimate state interest. See, e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

¹¹⁵ Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 439 (2000).

¹¹⁶ *Id.* at 440.

¹¹⁷ *McCall v. Shrimp*, 10 Pa. D. & C.3d 90 (Ch. Ct. 1978).

¹¹⁸ *Id.* at 90-91.

death without a bone marrow transplant.¹¹⁹ McFall sought an injunction to require Shrimp, his cousin, to donate his bone marrow, a procedure which would have imposed little risk but a great deal of pain.¹²⁰ The court refused to grant the injunction, citing the common law rule, which provides that "one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue."¹²¹ Similarly, in *Curran v. Bosze*,¹²² the court denied a father's request for an injunction to order a mother to produce her twin children for blood testing and possible bone marrow harvesting in order to save the life of their half-brother, who would die without a bone marrow transplant.¹²³

How does this analysis change upon death? One could argue that, morally, it is the duty of every able person to donate his or her organs upon death. Opponents would assert the classic "no duty" principle of American tort law, which protects individual autonomy. Yet, our notions of morality test this "no duty" rule with hypothetical "stories about children tripping, hitting their heads, and falling insensate into shallow ponds."¹²⁴ In these cases, most people conclude that failure to rescue, absent any personal risk to the hypothetical rescuer, is morally wrong.¹²⁵ Some states even impose criminal penalties in "duty of easy rescue" cases where assistance can be given without personal risk to the rescuer.¹²⁶ Arguably, organ donation falls within this same category of "duty of easy rescue." One could argue that there is "a presumptive duty to provide others with organs that may be vital

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 91.

¹²² See *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990).

¹²³ *Id.*

¹²⁴ Nelson, *supra* note 35, at 52.

¹²⁵ *Id.*

¹²⁶ See, e.g., Vt. Stat. Ann. Tit. 12 § 519(a) (1973):

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

Id. (providing for a maximum fine of \$100).

to them but are useless to us.”¹²⁷

2. *Military Conscription and Compulsory Vaccinations*

The rights to possess, use, and exclude others from one's body while one is alive are established by constitutional law. When the United States abolished slavery with the Thirteenth Amendment, a person could no longer be the property of another. This right is not absolute, however, as illustrated by the military draft. In *Arver v. United States*,¹²⁸ the Supreme Court held that raising an army by means of a selective draft does not impose involuntary servitude in violation of the Thirteenth Amendment. In its ruling, the Court held “it may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it.” Accordingly, “people can be conscripted into the military against their will and be made to put their bodies to the service of the common good.”¹²⁹

Similarly, compulsory vaccinations have been upheld as necessary for the common good.¹³⁰ These cases illustrate the exceptions to individual autonomy. In some circumstances, individuals are compelled by law to sacrifice their bodies for the public good. This Comment does not intend to argue that living people should be taken by the state as chattel and required to donate expendable organs. Rather, the purpose is to illustrate that there is not, nor has there ever been, an absolute right to bodily privacy in life, much less in death.

3. *Privacy Cases*

The Supreme Court developed a right of privacy under the rubric of substantive due process. According to the current Court's analysis, individuals have a right to define their own morality and existence.¹³¹ In order to do so, individuals have a

¹²⁷ Nelson, *supra* note 35, at 51.

¹²⁸ *Arver v. United States*, 245 U.S. 366, 378 (1918).

¹²⁹ Calabresi, *supra* note 110, at 2134.

¹³⁰ See *Jacobson v. Mass.*, 197 U.S. 11 (1905).

¹³¹ The Supreme Court recently stated:

In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not

certain amount of autonomy in decision-making about fundamental aspects for self-hood.¹³² This class of rights extend to "activities relating to marriage;"¹³³ "procreation; contraception;"¹³⁴ "family relationships; and child rearing and education."¹³⁵ The privacy right is not absolute, however, in that courts do not speak of "ownership." Legislation attempting to curtail a privacy right may be enacted if the state has a compelling interest in supporting the legislation and the actual statute is necessary to support the compelling interest. The best example of this analysis is illustrated by the abortion debate.

For a long time, laws against abortion obliged women to give their bodies to save fetuses or unborn children.¹³⁶ Some states still indicate that women may be punished if they do not care for their bodies for the benefit of their unborn child.¹³⁷ In *Roe v. Wade*,¹³⁸ the Supreme Court struck down a Texas statute criminalizing abortion. Many would concede that the Texas statute encroached on a fundamental right. *Roe* was a difficult case because of the strong state interests in protecting the fetus that were balanced on the government's side. It would have been more difficult if the court found that the fetus has a competing fundamental right. There is no indication, however, that the term "person" in the Constitution was ever meant to include fetuses.¹³⁹ Thus, the Court found that the Constitution protects a right for a woman to choose to terminate her pregnancy prior to viability.¹⁴⁰ Though *Roe*

be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. *Lawrence v. Tex.*, 539 U.S. 558, 562 (2003).

¹³² *Id.*

¹³³ *Loving v. Va.*, 386 U.S. 986 (1967).

¹³⁴ See *Poe v. Ullman*, 367 U.S. 497 (1961); *Griswold v. Conn.*, 381 U.S. 479 (1965).

¹³⁵ *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

¹³⁶ See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

¹³⁷ See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991).

¹³⁸ *Roe*, 410 U.S. at 113.

¹³⁹ *Id.*

¹⁴⁰ Viability is the point at which "the fetus . . . has the capability of meaningful life

suggests a right to make choices concerning one's own body, the Court retreated from this stance in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁴¹ leading many commentators to conclude that a constitutional right of ownership of our bodies is an overstatement.¹⁴² The *Casey* Court conceded that a state can interfere with a woman's individual autonomy and privacy if there is a compelling state interest and no "undue burden" on access to abortion.¹⁴³

Rather than focusing on abortion as a fundamental liberty, a different reading of *Roe* suggests the right of women to be on equal footing with men. Men can walk away from pregnancy so that the pregnancy has minimal impact on the man's life, career, and self-development. This option is not available to women. Applying this rationale, *Roe* stands for "a prohibition of discriminatory taking of women's bodies for the alleged common good, and not a prohibition of universal, non discriminatory appropriations for that purpose."¹⁴⁴ Based on this rationale, a statute that makes kidneys available to those who need them based on universal appropriation, even during life, may be valid in the face of severe public need. Furthermore, when looking at the government's competing interest, we are now dealing with a human being, rather than a fetus, whose life depends on the donation. This would seem to present an even more compelling interest in supporting legislation to mandate living organ donation. In consideration of such a law, the *McFall* court opined:

[f]or a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the specter of the swastika and the Inquisition, reminiscent of the horrors this portends.¹⁴⁵

Yet, even after *Roe*, courts have sometimes required pregnant

outside the mother's womb." *Id.* at 163.

¹⁴¹ *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309 (1994).

¹⁴² Calabresi, *supra* note 110, at 2136.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *McCall v. Shrimp*, 10 Pa. D. & C.3d 90, 92 (Ch. Ct. 1978).

women to undergo dangerous procedures for the protection of their fetuses. One court permitted a hospital to perform a caesarian section over the objections of a terminally ill woman who was 26 weeks pregnant, when the surgery posed substantial risks to the woman's health but was necessary for the fetus to live.¹⁴⁶ In sum, *Roe* stands at the intersection of two lines of cases. The first line operates on "liberty" principles, as they relate to intimate relationships, family, and decisions about whether to bear a child. The second line of cases puts recognizable limits on governmental power to mandate medical treatment or to bar its rejection.¹⁴⁷ The foregoing discussion of *Roe* and *Casey* shows that freedom from government intervention is not an absolute right. On occasion, state interests trump privacy as illustrated by abortion law. The same rationale could extend to organ procurement.

C. Privacy Rights End at Death

Several states have enacted presumed consent statutes that permit the removal of organs from a dead body without prior consent. The constitutionality of presumed consent laws has been questioned on two fronts: (1) as an invasion of privacy and (2) as a "taking" of property. The privacy challenge fails because privacy rights end when the individual is brain dead. The "taking" challenge has met with mixed reviews in the lower courts.

*1. Extracting Organs from Corpses is not an Invasion of Privacy*¹⁴⁸

In *Tillman v. Detroit Receiving Hospital*,¹⁴⁹ the Michigan Court of Appeals upheld a statute that permitted a dead daughter's corneas to be harvested without her mother's consent. The court explained that:

the privacy right encompasses the right to make decisions concerning the integrity of one's body However, this right is a personal one. It ends with the death of the person to whom

¹⁴⁶ In re A.C., 533 A.2d 611 (D.C. 1987).

¹⁴⁷ See *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309 (1994).

¹⁴⁸ See *infra* note 196 and the cases cited therein; *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999).

¹⁴⁹ *Tillman v. Detroit Receiving Hospital*, 360 N.W.2d 275 (Mich. Ct. App. 1984).

it has value. It may not be claimed by his estate or his next of kin.¹⁵⁰

Therefore, if there is any shield to guard against organ extraction, it takes the form of property, *not* privacy rights in death.¹⁵¹

2. *Incompetent Pregnant Women*

Interestingly, thirty-three states currently prevent the removal of life-sustaining medical care from an incompetent pregnant woman even when doing so denies the woman's express wishes stated in her living will.¹⁵² "The laws literally 'take' the bodies of incompetent pregnant women, treating them like chattel that may be drafted into service as fetal incubators for the state."¹⁵³ Pennsylvania acknowledges its "taking" of the incompetent pregnant woman's body by providing "just compensation" by paying the expenses associated with continued medical care.¹⁵⁴

Two cases address the constitutional questions posed by state laws preventing the removal of life-sustaining medical care from an incompetent pregnant woman. In *University Health Services v. Piazzi*,¹⁵⁵ a Georgia court refused to take a brain dead pregnant woman off life support until the birth of her fetus.¹⁵⁶ The court held that Donna Piazzi lacked power to terminate her pregnancy under state law, regardless of whether she had a will that provided those instructions.¹⁵⁷ The court said that any constitutional right to refuse treatment and to terminate her pregnancy were privacy rights that were extinguished when she became brain dead.¹⁵⁸

In *DiNino v. State ex rel. Gorton*,¹⁵⁹ JoAnn DiNino sued the state seeking a declaratory judgment to uphold her living will even

¹⁵⁰ *Id.* at 277.

¹⁵¹ *Id.*

¹⁵² Rao, *supra* note 115, at 409.

¹⁵³ *Id.* at 410.

¹⁵⁴ *Id.* See 20 PA. CONS. STAT. §5414(c)(1) (Supp. 1999).

¹⁵⁵ No. CV86-RCCV-464 (Richmond Cty. Super. Ct., Ga., Aug. 4, 1986).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 6.

¹⁵⁸ *Id.* at 7.

¹⁵⁹ *DiNino v. State ex rel. Gorton*, 684 P.2d 1297 (Wash. 1984).

if she were pregnant.¹⁶⁰ She argued that the state law suspending a living will during the course of pregnancy was unconstitutional.¹⁶¹ The Washington Supreme Court held that the case did not present a justiciable controversy because DiNino was neither terminally ill nor pregnant.¹⁶²

Under the privacy/property dichotomy, the brain dead pregnant woman has "crossed the legal boundary separating life from death, and thus receives precisely the same treatment under law as a corpse."¹⁶³ If she continues to have control over her body, the ownership must derive from property rather than privacy.¹⁶⁴ It follows from this line of cases, that a system could be devised where organ donation could be compulsory. Under such a system, upon death, organs would belong to the state and could be harvested, regardless of the wishes of the decedent or the decedent's family. If thirty-three states maintain this law when a fetus is the competing interest, then surely a human life struggling for survival is more compelling.

D. Property Rights in Corpses

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of the law."¹⁶⁵ As *Tillman* clarified, privacy rights are extinguished at death. Property interests, however, are usually transferred to the decedent's next of kin. If the U.S. government takes private property for public use without providing just compensation to the citizen from whom the property is taken, the government has violated the Takings Clause of the Fifth Amendment.¹⁶⁶ A claim under §1983¹⁶⁷ for an unconstitutional deprivation of property

¹⁶⁰ *Id.* at 1299.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1300.

¹⁶³ Rao, *supra* note 115, at 452.

¹⁶⁴ *Id.*

¹⁶⁵ U.S. CONST. amend. XIV, §1.

¹⁶⁶ *Id.* amend. V.

¹⁶⁷ 42 U.S.C.A. § 1983 (2002). Section 1983 is the civil action for deprivation of rights. To state a cognizable claim under § 1983, a plaintiff's complaint must allege that the conduct of a defendant, acting under color of state law, deprived the plaintiff of a right, privilege, or immunity secured by the Constitution of the United States. *Walker v. Reed*, 104 F.3d 156, 157 (8th Cir. 1997). If a plaintiff establishes a threshold claim under

must show: (1) a deprivation, (2) of property, (3) under color of state law.¹⁶⁸ Some legal scholars have argued that the taking of cadaveric organs without the explicit consent of the deceased constitutes an unconstitutional deprivation of property.¹⁶⁹ Currently, the courts do not recognize property rights in a corpse.¹⁷⁰ The law does recognize, however, a “quasi property right” of the family to dispose of the decedent’s remains in a manner consistent with its state’s laws.¹⁷¹ The Supreme Court has not yet addressed if the rights of possession of one’s own body are property interests protected by the due process clause of the Constitution.¹⁷² Nor has it addressed due process protections are applicable to the rights of next-of-kin to possess and control the bodies of their deceased relatives.¹⁷³ The lower courts are currently debating whether this property right is constitutionally protected.

*1. Unconstitutional Property Rights in Corpses v.
Constitutional Property Rights*

*a. Quasi Property Rights in Corpses are not
Constitutionally Protected*

Whether relatives of a deceased person have a constitutional property interest in the decedent’s body is uncertain. Thus far,

§ 1983 for an unconstitutional deprivation of property, [the] question becomes whether the state afforded constitutionally adequate process for the deprivation.” Newman v. Sathyavaglswarn, 287 F.3d 786, 786 (9th Cir. 2002).

¹⁶⁸ See *Parratt v. Taylor*, 451 U.S. 527, 536-537 (1981).

¹⁶⁹ See Jaffe, *supra* note 57.

¹⁷⁰ Rao, *supra* note 115, at 384.

¹⁷¹ *Id.* One court explained the difference between a property and a quasi property right in a corpse in the following manner:

Although . . . the body is not property in the usually recognized sense of the word . . . we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.

Pierce v. Swan Point Cemetery, 10 R.I. 227, 242-43 (1872).

¹⁷² See Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002).

¹⁷³ *Id.*

lower courts have issued inconsistent rulings. In *Georgia Lions Eye Bank Inc. v. Lavant*,¹⁷⁴ a mother claimed that corneal tissue had been wrongfully removed from her deceased infant, in violation of her Constitutional right of due process.¹⁷⁵ The parents had not objected to the removal of the tissue but neither had they been asked to consent.¹⁷⁶ At issue was the constitutionality of the Georgia cornea removal statute, which authorized the removal of corneal tissue from a decedent, if no objection had been made by the decedent while alive or by the next-of-kin after the decedent's death.¹⁷⁷ The lower court held that the statute violated "due process because it deprives a person of a property right in the corpse of his next-of-kin and fails to provide notice and an opportunity to object."¹⁷⁸

The Supreme Court of Georgia reversed the lower court's decision with a strong public policy argument. The court noted that the statute in question had been passed by a "virtually unanimous General Assembly," and that "before its passage, approximately twenty-five corneal transplants were performed each year," while after its passage "more than 1000 persons regained their sight through transplants."¹⁷⁹ This court balanced the statute's public benefit against its infringement on a parent's rights. "The preservation of the public health is one of the duties devolving upon the State as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health."¹⁸⁰

The court explained that any "quasi" property right that a relative might have in the body of a decedent was one that was created by the courts at common law and was not a right created by either the U.S. or Georgia constitutions.¹⁸¹ Once the court found that this right was not a constitutional right, it found no problem in reversing the lower court and upholding the statute

¹⁷⁴ Ga. *Lions Eye Bank v. Lavant*, 335 S.E.2d 127 (Ga. 1985).

¹⁷⁵ *Id.* at 127.

¹⁷⁶ *Id.* at 128.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 129.

¹⁸¹ *Id.* at 128.

since, according to the court, the legislature has authority to modify or abrogate a common law right of action.¹⁸² The statute, which allowed for the harvest of corneas, in some cases without the consent of the next-of-kin or even notice to the next-of-kin, was upheld.¹⁸³

In *State v. Powell*,¹⁸⁴ the Florida Supreme Court upheld the constitutionality of Florida's cornea donation statute, which operated on presumed consent.¹⁸⁵ The parents of the decedents claimed that medical examiners violated the state constitution when they removed the corneas of each decedent without notice or prior consent.¹⁸⁶ The Court rejected their arguments, stating that "a person's constitutional rights end at death."¹⁸⁷ It then emphasized that "the next of kin have no property right in the remains of the decedent," and that the rights of a decedent's next-of-kin are limited to those of burial and sepulture.¹⁸⁸

The Florida Supreme Court recently narrowed the scope of its holding in *Powell* in *Crocker v. Pleasant*.¹⁸⁹ The Court allowed a § 1983 claim to go forward for interference with the right of next-of-kin to possess the body of their son because "in Florida, there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial."¹⁹⁰ The Court distinguished *Powell* based on the "infinitesimally small intrusion" of the removal of the cornea balanced against the public health interest in cornea donation,¹⁹¹ and held that its rejection of a constitutional attack "on a narrowly drawn statute regulating the disposition of the corneas of a deceased person does not translate into the broader conclusion that the right to possess a loved one's remains for the purposes of burial should never be accorded

¹⁸² *Id.*

¹⁸³ *Id.* at 129.

¹⁸⁴ 497 So.2d 1188, 1189 (Fla. 1986).

¹⁸⁵ *Id.* at 1188.

¹⁸⁶ *Id.* at 1190.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1191.

¹⁸⁹ 778 So.2d 978 (Fla. 2001).

¹⁹⁰ *Id.* at 988.

¹⁹¹ *Id.* at 984.

protected status under the Fourteenth Amendment."¹⁹²

b. Quasi Property Rights In Corpses are Constitutionally Protected

The Sixth and Ninth Circuits have acknowledged a next-of-kin property right in the bodies of corpses. In *Brotherton v. Cleveland*,¹⁹³ a widow and her children sued the county coroner for violation of equal protection and due process rights when the coroner removed and donated the decedent's corneas without consent.¹⁹⁴ The Sixth Circuit found that the coroner's actions amounted to a deprivation of constitutionally protected property under §1983. The court held that the aggregate of rights granted to the wife in the body of her dead husband, which included the right to possess the body, to control disposal of the body, and to file suit for disturbance to the body, rose to the level of a property interest protected by the Constitution.¹⁹⁵ *Brotherton* was a controversial holding because, as the dissenting judge stated, "Ohio law has made it very clear that there is no property right in a dead person's body."¹⁹⁶ To address this issue, the court explained that the constitutional property interest turns on the substance of the interest recognized, not the name given to that interest. Therefore, rights of the next of kin in Ohio "form a substantial interest in the dead body, regardless of Ohio's classification of that interest."¹⁹⁷

The Sixth Circuit affirmed its decision in *Whaley v. County of Tuscola*,¹⁹⁸ explaining that states recognize a common law right that allows the next-of-kin to possess the body for burial and assert

¹⁹² *Id.* at 985.

¹⁹³ 923 F.2d 477 (6th Cir. 1991).

¹⁹⁴ *Id.* at 477.

¹⁹⁵ *Id.* at 482.

¹⁹⁶ *Id.* at 483. See *Everman v. Davis*, 561 N.E.2d 547 (stating that the possessory right in a body for the purpose of preparation, mourning, and burial does not constitute a property right in the body of another); *Hayhurst v. Hayhurst*, 4 Ohio Law Abs. 375 (C.P. Hamilton County 1926) (concluding that there can be no property in a dead body); *Hadsell v. Hadsell*, 3 Ohio Cir. Dec. 725, 726 (Cir. Ct. Dec. 1893) (holding that a dead body is not property, and it does not belong to surviving relatives in the order of inheritance as other property of an estate).

¹⁹⁷ *Brotherton*, 923 F.2d at 482.

¹⁹⁸ *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995).

a claim against others who disturb the body.¹⁹⁹ The common law right, in conjunction with the statutory right to control the disposition of the body as recognized in each state's adoption of the UAGA, is sufficient to create a next-of-kin property interest in the corneas of their deceased relatives that can not be taken without due process of the law.²⁰⁰

More recently, in *Newman v. Sathyavaglswaran*,²⁰¹ parents of deceased children brought a § 1983 action against a coroner, alleging a taking of their property without due process.²⁰² The coroner obtained possession of the bodies and pursuant to California Government Code §27491.47,²⁰³ removed the corneas from those bodies without the knowledge of the parents and without an attempt to notify them and request consent.²⁰⁴ Relying on the Sixth Circuit's opinions in *Whaley* and *Brotherton*, the Ninth Circuit held that the exclusive right of next-of-kin to possess bodies of deceased family members created a property interest entitled to due process protection.²⁰⁵ The Ninth Circuit emphasized that simply because California forbids the trade of body parts for profit does not mean that the next-of-kin lack a property interest in them.²⁰⁶ The Supreme Court has "never held that a physical item is not 'property' simply because it lacks a positive economic or market value."²⁰⁷

While the court in *Newman* held that the state owed the parents some due process, it remains unclear what constitutes due process in these circumstances. The court acknowledges the state's interest by stating:

[w]e do not hold that California lacks significant interests in

¹⁹⁹ *Id.* at 1116.

²⁰⁰ *Id.* at 1117.

²⁰¹ *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002).

²⁰² *Id.* at 786.

²⁰³ CALIFORNIA CODE § 27491.47(a) allowed the coroner to "'remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody' without any effort to notify and obtain the consent of next of kin 'if . . . [t]he coroner has no knowledge of objection to the removal.'" *Newman*, 287 F. 3d at 795.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 795-96.

²⁰⁶ *Id.* at 797.

²⁰⁷ *Id.*

obtaining corneas or other organs of the deceased in order to contribute to the lives of the living [but]. . . courts are required to evaluate carefully the state's interests in deciding what process must be due the holders of property interests for their deprivation.²⁰⁸

In *Cruzan by Cruzan v. Director, Missouri Dep't. of Health*,²⁰⁹ the Supreme Court decided that states have an "unqualified interest" in the preservation of human life.²¹⁰ The *Newman* court also acknowledged that "[a]n interest so central to the state's core police powers as improving the health of its citizens is certainly one that must be considered seriously in determining what process the parents were due."²¹¹

2. Reconciling Presumed Consent and Property Law

If the court finds a property interest in a deceased relative's body, the question then becomes how much weight is given to that interest? The court began to measure the quantitative significance of the constitutional property interest in a deceased relative's body in *Mansaw v. Midwest Organ Bank*.²¹² In *Mansaw*, a father challenged the constitutionality of a Missouri statute that allowed his dead son's organs to be harvested, based solely upon the consent of the boy's mother, without securing his consent. The court stated that "the only constitutionally protectable interest that a person may have in a deceased relative's body should be characterized as a property interest."²¹³ The court called the property interest "minimal," however, visualizing it as a "low right on the constitutional totem pole" when compared to other rights such as privacy.²¹⁴ The father's right was further diminished because it was a joint interest shared equally with the boy's mother.²¹⁵ Therefore, the court held that half of an interest in this property right did not outweigh the state's interest in providing

²⁰⁸ *Id.* at 799.

²⁰⁹ 497 U.S. 261 (1990).

²¹⁰ *Id.* at 262.

²¹¹ *Newman v. Satnyavaglswaran*, 287 F.3d at 799.

²¹² *Mansaw v. Midwest Organ Bank*, 1998 WL 386327 (W.D. Mo. 1998).

²¹³ *Id.* at 8.

²¹⁴ *Id.*

²¹⁵ *Id.*

organs to the living. "Plaintiff's interest must yield to the greater rights of the state—and our society—in carrying out its public policy, when the co-owner has consented and the hospital is unaware of [the] plaintiff's objections."²¹⁶

While the lower courts disagree as to the existence of constitutional property rights in corpses, where a property right is recognized, the requirement of proper due process does not exclude the possibility of presumed consent laws. After holding that a constitutionally protected property right existed, the *Brotherton* court suggested that the right would not be violated if a proper pre-deprivation procedure existed.²¹⁷ The court did not suggest an appropriate procedure but mentioned the need for the next-of-kin to be notified and given an opportunity to be heard.²¹⁸ Additionally, the dissent in *Georgia Lions* suggested the need for minimum due process requirements of notice to the next-of-kin and a chance for the next-of-kin to object.²¹⁹

Where the next-of-kin has a property interest in a deceased relative's body, presumed consent laws provide the necessary due process. A presumed consent law can provide appropriate pre-deprivation procedures so that the government can take the deceased's organs and lawfully take the property from the next-of-kin. For example, a Pennsylvania statute²²⁰ provides indirect "compensation" to the next-of-kin, allowing money from the trust fund to be used for things such as the decedent's hospital and funeral expenses.²²¹ It is interesting to note that Pennsylvania is also the only state that acknowledges its "taking" of the incompetent pregnant woman's body by providing "just compensation" by paying the expenses associated with continued medical care.²²²

Since state, federal, and international laws forbid the exchange

²¹⁶ *Id.*

²¹⁷ *Brotherton v. Cleveland*, 923 F. 2d 477, 482 (6th Cir. 1991).

²¹⁸ *Id.*

²¹⁹ *Ga. Lions Eye Bank v. Lavant*, 335 S.E.2d 127 (Ga. 1985) (Marshall, J., dissenting).

²²⁰ 20 PA. CONS. STAT. §§ 8621-8622.

²²¹ *Id.* § 8622(b)

²²² *Id.* §5414(c)(1). Pennsylvania is also the first state to implicitly recognize the parallel between abortion law and organ procurement. See discussion Part IV.C, *supra*.

of organs for direct compensation, such indirect measures should satisfy the constitutional requirement of "just compensation." Presumed consent laws should also ensure that the public as a whole receives notice of the eventual taking through public education measures that would need to be in place. Although presumed consent might not allow the next-of-kin to be heard or object to the removal of organs, due process does not require notice and a hearing in every situation.²²³ Several reasons exist for excusing the hearing and objection requirements in this scenario. First, allowing the next-of-kin with the opportunity to be heard and object will defeat the purpose of presumed consent laws. Second, the Supreme Court has explained that procedural Due Process guarantees are directed primarily at adjudicative action and are rarely applicable to rulemaking.²²⁴ "Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption."²²⁵ Third, presumed consent laws give the decedent the ultimate choice over his or her organs and intend to facilitate family discussion on organ donation while all parties are alive. When the decedent's organs are removed, family members may argue that the state is taking their property interest in the deceased's body. If so, there has been adequate process. The family discussion that took place during the decedent's life should be construed as a "hearing" and a chance to "object."²²⁶ The next-of-kin, who will hold the quasi property interest in the decedent's body, can speak to family members about organ donation and will have their say during the decedent's lifetime."²²⁷ When the courts "[c]ouple [the] rather minimal [property] interest with the exigent circumstances surrounding and accompanying the organ donation decision and the State's legitimate and compelling interest in providing for and securing a future for the living . . . it becomes highly doubtful that [any significant] process is due [to the] plaintiff."²²⁸ Therefore,

²²³ See *Bi-metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

²²⁴ *Id.*

²²⁵ *Id.* at 441.

²²⁶ Samantha A. Wilcox, *Presumed Consent Organ Donation in Pennsylvania: One Small Step for Pennsylvania, One Giant Leap for Organ Donation*, 107 DICK. L. REV. 935, 949-50 (2003).

²²⁷ *Id.*

²²⁸ *Mansaw v. Midwest Organ Bank*, 1998 WL 386327 (W.D. Mo. 1998).

even if a constitutionally protected property right exists, presumed consent laws survive the constitutional challenge.

V. International Law and Presumed Consent

NOTA and UAGA are insufficient to replenish organ demand in the U.S. and, therefore, prompt would-be recipients to take matters into their own hands.²²⁹ Unfortunately, self-help measures result in the exploitation of impoverished inhabitants of third world countries, in the manner described in Part II above. The only way to solve the crisis is through international collaboration to increase organ supply. A market in which the impoverished sell their organs to the rich is not an ethical solution. The WMA and the European Community have taken steps to denounce the black market for organs. Accordingly, there is international support for a movement towards presumed consent.

A. *The Convention on Human Rights and Biomedicine*

In recognition of the human rights abuses occurring in impoverished countries, many European countries are passing laws to protect the exploited from selling organs for a pittance. In 1997, the Council of Europe signed a treaty to protect living donors. The Council agreed that “donor consent was necessary for any organ procurement law and that financial gain in the organ market was highly unethical.”²³⁰ In 2001, the Council of Europe enacted the Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Transplantation of Organs and Tissues of Human Origin (the Protocol).²³¹ Parties to the Protocol use their own internal laws to effectuate the measures enunciated by the Convention.²³² The Protocol distinguishes

²²⁹ See Finkel, *supra* note 6.

²³⁰ Troy R. Jensen, *Organ Procurement: Various Legal Systems and their Effectiveness*, 22 HOUS. J. INT'L. L. 555, 557 (2000); see Council of Europe: Convention on Human Rights and Biomedicine and Explanatory Report, Apr. 4, 1997, 36 I.L.M. 817 (1997), available at <http://conventions.coe.int/treaty/en/treaties/html/164.htm>.

²³¹ See Council of Europe, Convention on Human Rights and Biomedicine and Explanatory Report, *supra* note 230; Council of Europe, Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin, E.T.S. N. 186, Jan. 24, 2002, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/186.doc>.

²³² Council of Europe, Additional Protocol to the Convention on Human Rights and

between: (1) living donors capable of giving consent,²³³ (2) incompetent living donors,²³⁴ and (3) deceased donors.²³⁵

1. Consent from Living Donors

When obtaining consent from a living donor, the emphasis is placed on informed consent.²³⁶ Article 5 of the Protocol requires that "interventions in the field of organ and tissue transplantation can only be performed after a person has given free and informed consent which can be freely withdrawn at any time."²³⁷ In order to avoid coercion, the Protocol recommends that "the donor be assured that he or she can withdraw . . . consent at any time in complete confidence."²³⁸ To that end, the donor should be "interviewed in private and helped to cope with the consequences of [that] decision."²³⁹ Consent is paramount when the organ donor is a living human being. Based on the foregoing, it is clear that both international and U.S. law reject the idea of forcible organ extraction during life, even when one sibling could save the life of another by providing the needed kidney.

2. Protecting Incompetent Donors

The law differs when the potential donor is unable to give consent to the removal of organs. Article 14 of the Protocol deals with the question of the removal of organs from a living person who lacks the capacity to give consent.²⁴⁰ "The principle is that this practice is prohibited."²⁴¹ The Convention makes an allowance for removal of regenerative tissues in exceptional

Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin, Explanatory Report, para. 35, *available at* <http://www.unav.es/cdb/coeadtrasplanteser.html> (last visited Jan. 20, 2005).

²³³ *Id.* para 73.

²³⁴ *Id.* para. 80.

²³⁵ *Id.* para. 98.

²³⁶ *Id.* para. 73.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* para. 80.

²⁴¹ *Id.*

circumstances where the beneficiary is genetically compatible.²⁴² For instance, the Protocol would allow “the removal of bone marrow from a minor for the benefit of a brother or sister.”²⁴³ Furthermore, “removal is only authorized on the condition that, in the absence of donation, the life of the recipient is in danger and the risk to the donor is minimal.”²⁴⁴ Finally, the authorization of the representative of the person not able to consent is needed before the regenerative tissue is removed.²⁴⁵

3. *Organ and Tissue Removal from the Deceased*

a. *Establishing Death*

A decedent's death must be established before organs or tissues may be removed “in accordance with the law.”²⁴⁶ It is the responsibility of each Member State to legally define the specific procedure for declaring death.²⁴⁷ In most countries, the law defines death as “brain death while the essential functions are artificially maintained.”²⁴⁸ Article 16 provides a safeguard for the deceased person by insuring that the medical team who certifies death is not the same one that is involved in the transplant.²⁴⁹ “Failure to keep the two functions separate would jeopardize the public's trust in the transplantation system and might have an adverse affect on donation.”²⁵⁰ Recognizing that individuals may opt out of organ donation if they sense that surgeons have conflicted interests in keeping patients alive, trust and respect are essential to a successful system of organ procurement.

b. *Presumed Consent*

The Convention's primary concern was to increase organ donation. In order to effectuate this concern, the Protocol outlines

²⁴² *Id.* para. 81.

²⁴³ *Id.* para. 83.

²⁴⁴ *Id.* para. 86.

²⁴⁵ *Id.* para. 87.

²⁴⁶ *Id.* para. 94.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* para. 96.

²⁵⁰ *Id.*

methods for obtaining consent. Article 17 prohibits the removal of organs unless consent or authorization as required by law is obtained.²⁵¹ "This requires member States to have a legally recognized system specifying the conditions under which removal of organs or tissues is authorized."²⁵² Under the Protocol, the Member States should, but are not required to, take measures to inform the public about matters relating to consent or authorization.²⁵³ The Protocol does not mandate either an "opt in" or "opt out" system. Instead, it leaves the decision to the individual Member States.²⁵⁴

The Protocol emphasizes the importance of the potential donor's decision either to refuse or consent to organ donation. "If a person has made known their wishes for giving or denying consent during their lifetime, these wishes should be respected after his/her death."²⁵⁵ Objection in an "opt out" system or consent in an "opt in" system should be registered in an official facility for recording these wishes.²⁵⁶ If the donor lacked the capacity to consent during life, organs may be removed if all the authorizations required by law have been obtained.²⁵⁷

The Protocol declined to adopt either an "opt in" or "opt out" system, explaining that, "[w]ithout anticipating the system to be introduced, the Article accordingly provides that if the deceased person's wishes are at all in doubt, it must be possible to rely on national law for guidance as to the appropriate procedure."²⁵⁸ The Protocol acknowledged the validity of both systems. In some countries, "the law permits that if there is not explicit or implicit objection to donation, removal can be carried out."²⁵⁹ In that case, the law provides a means of expressing intention, such as drawing up a register of objections.²⁶⁰ In other countries, "the law does not

²⁵¹ *Id.* para. 98.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* para. 101.

²⁵⁵ *Id.* para. 99.

²⁵⁶ *Id.*

²⁵⁷ *Id.* para. 100.

²⁵⁸ *Id.* para. 101.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

prejudge the wishes of those concerned and prescribes inquiries among relatives and friends to establish whether or not the deceased person was in favour of organ donation.”²⁶¹ Unless national law provides otherwise, the Article states that “such authorization should not depend on the preferences of the close relatives themselves for or against organ donation.”²⁶² “It is the expressed views of the potential donor which are paramount in deciding whether organs or tissue may be retrieved.”²⁶³

While not explicitly stating a preference for a system of presumed consent, the Protocol’s preference can be inferred by Article 19, which advocates the promotion of donation.²⁶⁴ “Because of the shortage of available organs, this article makes a provision for Parties to take all appropriate measures to promote the donation of organs and tissues.”²⁶⁵ The Article states, “[i]t is also appropriate to remember that organ and tissue removal from deceased persons has to be given priority if living donation is to be minimized.”²⁶⁶ In contrast, the Protocol condemns the sale of organs by stating that “the human body and its parts shall not, as such, give rise to financial gain.”²⁶⁷ Any trade in organs for financial gain is prohibited. The rationale is that, “[o]rgan or tissue traffickers may also use coercion either in addition to or as an alternative to offering inducements . . . [and] [s]uch practices cause particular concern because they exploit vulnerable people and may undermine people’s faith in the transplant system.”²⁶⁸ Since an organ market is strictly prohibited, donation from deceased persons is favored, and steps to increase donation are championed. The Protocol undoubtedly supports a presumed consent system of organ donation.

²⁶¹ *Id.*

²⁶² *Id.* para. 102.

²⁶³ *Id.*

²⁶⁴ *Id.* paras. 105-107.

²⁶⁵ *Id.* para. 105.

²⁶⁶ *Id.* para. 107.

²⁶⁷ *Id.* para. 113.

²⁶⁸ *Id.* para. 119.

B. European Models of Presumed Consent

1. Presumed Consent in France

Recognizing a growing shortage of kidneys for transplantation, France passed its presumed consent law in 1976.²⁶⁹ The French Loi de Cavaillet provides:

An organ to be used for therapeutic or scientific purposes may be removed from the cadaver of a person who has not during his lifetime made known his refusal of such procedure. If, however, the cadaver is that of a minor or a mentally defective person, organ removal for transplantation must be authorized by his legal representative.²⁷⁰

The law did not outline the procedure for objecting to organ donation.²⁷¹ In 1978, the Council of State, France's highest advisory and dispute resolving body, issued a decree that specified the law's procedural requirements.²⁷² The decree provided for the right of the potential donor to object to the donation of his or her organs "by any means" and at any time.²⁷³ Any objection would be registered in a hospital register maintained for that purpose.²⁷⁴ The decree also allows anyone bearing witness to a patient's objection to register the patient's refusal in the register.²⁷⁵ Any physician who is responsible for removing organs from a patient must check the register to ensure that no objection has been made.²⁷⁶ Therefore, reasonable efforts to determine whether any objections have been made are required, while consent from family members is not.

²⁶⁹ Law of France No. 76-1181.

²⁷⁰ Emily Denham Morris, *The Organ Trail: Express Versus Presumed Consent As Paths to Blaze in Solving a Critical shortage*, 90 KY. L. J. 1125, 1135 (2001-2002).

²⁷¹ *Id.*

²⁷² *Id.* at 1136; see also William N. Gerson, *Refining the Law of Organ Donation: Lessons From the French Law of Presumed Consent*, 19 N.Y.U. J. INT'L L. & POL. 1013, 1023 (1986).

²⁷³ Gerson, *supra* note 272, at 1023.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

2. *Presumed Consent in Austria*

Austria's Hospital Law states that "[i]t shall be permissible to remove organs . . . from deceased persons" for the purpose of transplantation and that "[s]uch removal shall be prohibited if the physicians are in possession of declaration in which the deceased person, or prior to his death, his legal representative, has expressly refused his consent to organ donation."²⁷⁷ Austria is the only country with a pure presumed consent system, as it does not offer the next-of-kin an opportunity to object to donation of the deceased's organs.²⁷⁸ Austrian physicians do not discuss donation with the family unless the family raises the issue that the deceased is a minor.²⁷⁹ In order to avoid the organ procurement, the individual must have objected to donation, and this objection must be known to the physician at the relevant hour.²⁸⁰ The physician has no affirmative duty to search for documents indicating consent or non-consent even if there is doubt regarding the decedent's wishes.²⁸¹

3. *Presumed Consent in Spain*

Spain is the world leader in organ donation. Organ donations have increased by 142% since 1989.²⁸² Spain operates under a presumed consent system.²⁸³ While presumed consent is standard, families are still asked if their loved ones will be organ donors.²⁸⁴ Another factor that makes the Spanish system unique is "active

²⁷⁷ Federal Law of 1 June 1982 (Serial No. 273), ch. 7, § 62a(1), amended to the Hospital Law, No. 113, *reprinted in* Legislative Responses to Organ Transplantation 132 (1994).

²⁷⁸ See W. Land and B. Cohen, *Postmortem and Living Organ Donation in Europe: Transplant Laws and Activities*, 24 Transplantation Proceedings 2165 (1992).

²⁷⁹ Marie-Andrée Jacob, *On Silencing and Slicing: Presumed Consent to Post-Mortem Organ "Donation" in Diversified Societies*, 11 TULSA J. COMP. & INT'L L. 239 (2003).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Mary Helen Spooner, *More Countries Hope to Copy Spain's Organ-Donation Success*, CMAJ JAMC (2003), available at <http://www.cmaj.ca>.

²⁸³ See Caplan & Zink, *supra* note 109.

²⁸⁴ Lori Hartwell, *Global Organ Donation Policies Around the World*, in CONTEMPORARY DIALYSIS & NEPHROLOGY (Dec. 1999), available at <http://www.lorihartwell.com/GlobalOrganDonationPolicies.pdf>.

detection.”²⁸⁵ Active detection means “having transplant coordinators visit emergency rooms and the ICU on a daily basis, checking the roster of patients and their status.”²⁸⁶ Spain created the Organizacion Nacional de Trasplantes (ONT), a network of transplant coordinators in 139 intensive care units across the country.²⁸⁷ ONT professionals identify potential organ donors by closely monitoring the emergency departments and tactfully discussing the donation process with families of the deceased.²⁸⁸ A survey by Spanish researchers found that out of 200 families that declined to have their relatives’ organs donated, 78% changed their mind after the process was explained in detail.²⁸⁹ The success of the Spanish system can be attributed to the combination of presumed consent and its efficient procurement system that educates the families of potential donors.²⁹⁰

C. The Council Of Europe’s Response to Organ Trafficking

At the June 2003 Parliamentary Assembly,²⁹¹ the Council addressed the problem of “transplant tourism,” which has prospered hand in hand with the rapid progress in medical science and technology that has made organ transplantation a routine medical procedure practiced in hospitals across the world.²⁹² The Council reiterated:

The supply of organs from cadaveric, but particularly from living, donors is very limited and strictly controlled in Europe. There are currently 120,000 patients on chronic dialysis treatment and nearly 40,000 patients waiting for a kidney transplant in Western Europe alone. Some 15% to 30% of patients die on waiting lists, as a result of chronic shortage of

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Spooner, *supra* note 282.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Rafael Matesanz and Blanca Miranda, *A Decade of Continuous Improvement in Cadaveric Organ Donation: The Spanish Model*, 15 J. NEPHROL. 22, 28 (2002), available at <http://www.sin-italy.org/jnonline/Vol15n1/22.html>.

²⁹¹ *Trafficking in Organs in Europe*, Eur. Consult. Ass’n, 21st Sess., Doc. No. 1611 (2003), available at <http://assembly.coe.int/documents/adoptedtext/ta03/EREC1611.htm> [hereinafter Recommendation 1611].

²⁹² *Id.*

organs. The waiting time for transplantation, currently about three years, will reach almost ten years by the year 2010.²⁹³

The Council then noted, “[i]nternational criminal organizations have identified this lucrative opportunity caused by the “gap” between organ supply and demand, putting more pressure on people in extreme poverty to resort to selling their organs.”²⁹⁴ Organ trafficking has reached a level of international concern since “it is very likely that further progress in medical science will continue to increase the gap between the supply of, and demand for, organs.” The Council noted that poverty was the main incentive for selling kidneys.²⁹⁵ “As a result of poverty, young people in some parts of eastern Europe have sold one of their kidneys for sums of \$2,500 to \$3,000, while recipients are said to pay between \$100,000 and \$200,000 per transplant.”²⁹⁶ The Council voiced the “grave concern that following illegal transplants the donor’s state of health generally worsens in the medium term, due to the absence of any kind of medical follow-up, hard physical work, and an unhealthy lifestyle connected to inadequate nutrition and a high consumption of alcohol.”²⁹⁷ In a twist of fate, “[m]ost illegal donors will thus be forced in time to live on dialysis treatment or await, in turn, a kidney transplant.”²⁹⁸ The situation presents difficult questions: “Should the poor provide for the health of the rich? Should the price of alleviating poverty be human health? Should poverty compromise human dignity and health? And in terms of medical ethics, should help to recipients be counterbalanced by neglect of, and harm to, donors?”²⁹⁹ Almost everyone agrees that it is a tragedy for the poor to sell their bodies for the health of the rich.

The Council of Europe criticized the “recent trends in some western European countries towards less restrictive laws, which would allow greater scope of unrelated living donation.”³⁰⁰

²⁹³ *Id.* para. 2.

²⁹⁴ *Id.* para. 3.

²⁹⁵ *Id.*

²⁹⁶ *Id.* para. 6.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* para. 7.

³⁰⁰ *Id.* para. 8.

Calling for universal action, the Council stated, "[t]rafficking in organs, like trafficking in human beings or drugs, is demand driven."³⁰¹ Combating this type of crime should not remain the sole responsibility of countries in Eastern Europe.³⁰² The Council listed examples of measures that should be taken by all member states to minimize the risk of organ trafficking in Europe such as: reducing demand, promoting organ donation more effectively, maintaining strict regulation with regard to living unrelated donors, guaranteeing transparency of national registers and waiting lists and establishing the legal responsibility of the medical profession for tracking irregularities and sharing information.³⁰³

The Council once again denounced the idea of a market-based distribution of organs. "The principal according to which the human body and its parts shall not, as such, give rise to financial gain is part of the legal *acquis* of the Council of Europe."³⁰⁴ While those in favor of an organ market cite the inevitable sale of organs as a call for legalization and regulation, the Council called for prohibition by strengthening existing laws.³⁰⁵ While the prohibition of organ trafficking is legally established in the Council of Europe member states, most countries still have legislative loopholes in this domain.³⁰⁶ Criminal responsibility for organ trafficking is rarely specified in national criminal codes.³⁰⁷ "Criminal responsibility should include brokers, intermediaries, hospital/nursing staff and medical laboratory technicians involved

³⁰¹ *Id.* para. 9.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* para. 12.

This principal, already present in Resolution (78) 29 of the Committee of Ministers and confirmed in particular, by the final declaration of the 3rd conference of European Health Ministers, which was held in Paris in 1987, was enacted by Article 21 of the Convention on Human Rights and Biomedicine (ETC No. 164). The principle was reiterated in its Additional Protocol on the Transplantation of Organs and Tissues of Human Origin (ETS No. 186), opened for signature in January 2002. *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

in the illegal transplant procedure.”³⁰⁸ Medical staff who even encourage transplant should also be eligible for prosecution.³⁰⁹ Furthermore, “the medical staff involved in follow-up care of patients who have purchased organs should be accountable if they fail to alert the health authorities of the situation.”³¹⁰

The Council enacted a four part plan that included actions to be taken by European member states, “donor countries,”³¹¹ “demand countries,”³¹² and relevant bodies of the Council of Europe.³¹³ Member states are invited to sign and ratify the Convention on Human Rights and Biomedicine³¹⁴ and the United Nation Convention against Transnational Organized Crime.³¹⁵ Additionally, member states are asked “to recognize their common responsibility in minimizing the risk of organ trafficking by strengthening existing mechanisms of co-operation,” and to adopt and apply the recommendations in the WMA Statement on Human Organ and Tissue Donation and Transplantation.³¹⁶

Members of “donor countries” are asked to “improve primary prevention through awareness-raising and peer education, particularly in rural areas, in partnership with NGOs, the media, and relevant international agencies.”³¹⁷ They are also asked to work with the Council of Europe to enforce criminal codes and “implement national anti-corruption programs” and “national poverty reduction strategies.”³¹⁸

The “demand countries” are asked to “maintain strict laws in

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* para. 14.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* The World Medical Association’s October 2000 declaration on human organ transplantation contains a set of ethical principles concerning organ transplantation. In particular, they state: “[p]ayment for organs and tissues for donation and transplantation should be prohibited.” World Medical Association, *supra* note 8.

³¹⁷ Recommendation 1611, *supra* note 291, para. 14.

³¹⁸ *Id.*

regard to transplantation from unrelated living donors,"³¹⁹ "to deny national medical insurance reimbursements for illegal transplants abroad,"³²⁰ "to deny national insurance payments for follow-up care of illicit transplants, except where such a refusal would endanger the life or health of the patients unable to cover the cost of vital treatment themselves,"³²¹ "to take appropriate measures to encourage individuals to indicate, by means of statements of 'consent,' their wish to donate their organs after their death, in order to increase the availability of organs and tissues obtained post mortem,"³²² and "to cooperate and provide expertise to "donor" countries in connection with trafficking in human beings and organs."³²³

The Parliamentary Assembly will instruct the relevant bodies of the Council of Europe "to develop, in co-operation with relevant organizations, a European strategy for combating trafficking in organs," "to advise and assist member states on organizational measures necessary for putting in place an efficient transplant system to minimize the risk of organ trafficking," and "to provide legal assistance in drafting specific amendments to national criminal codes."³²⁴ Additionally, to address the larger problem of poverty which causes people to sell their organs, the Council is instructed to "call on member states to demonstrate European solidarity towards the countries in eastern Europe which are most affected by the vicious cycle of poverty and to assist them, in co-operation with the international financing institutions and the international donor community, in developing measures to reduce poverty and create a secure business environment for investment."³²⁵

VI. Conclusion

As a "demand country," the United States is in a position to reduce the burden on the impoverished inhabitants of eastern

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

Europe who sell their body parts for the health of the rich, by increasing the supply of organs available within the United States. Primarily, the United States could help relieve the burden by taking appropriate measures to increase the number of available organs obtained postmortem by enacting presumed consent laws.³²⁶ International collaboration is the only effective way to stop the flourishing black market.³²⁷ While some commentators argue for regulation of an organ market, it is clear that the World Medical Association, the Council of Europe, the United States, and a majority of ethicists are repulsed by the idea.

Presumed consent is a viable alternative. Presumed consent is not only a morally and legally justified course of action, it also falls in line with the principles enunciated by international organizations. A major fallacy of the “opt in” system of organ procurement is the assumption that people who have not registered to donate their organs have expressed their refusal to donate. People who fail to sign donor cards would say that organ donations are desirable and noble when asked.³²⁸ Arguably, presuming consent allows us to meet the wishes of most people.³²⁹ Furthermore, the “opt out” registry protects the individual autonomy of those who do not want to donate their organs. Unless it can be shown that presumed consent is ethically unacceptable, society has a duty to pursue the option that would save thousands of lives.³³⁰

As this Comment has discussed, property and privacy rights guide the legal analysis of organ donation under U.S. law. While the individual does not have a right of privacy in death, it appears that courts are moving towards recognizing the next-of-kin’s right to possess the decedent’s body as a constitutionally protected property right. The recognition of this right, however, does not preclude presumed consent. It merely requires that the

³²⁶ *Id.*

³²⁷ See *id.* (noting the necessity of “[h]armoni[zing] data and strengthen[ing] co-operation mechanisms for the allocation of organs in donation procedures”).

³²⁸ Fady Moustarah, *Organ Procurement: Let’s Presume Consent*, 158 CAN. MED. ASSOC. J. 231-4 (1998), available at <http://www.cmaj.ca/cgi/reprint/158/2/231.pdf> (last visited Feb. 16, 2005).

³²⁹ See *id.*

³³⁰ *Id.*

government provide due process. Since the Supreme Court has said that the states have an "unqualified interest"³³¹ in the preservation of human life, it does not appear that a significant amount of due process is required. Thus, presumed consent laws would allow the government to interfere with the property interests of the next-of-kin and procure organs for the benefit the public

There are substantial parallels between organ transplantation and abortion law. When an individual is alive, the Fourteenth Amendment protects that person from government intrusion whether in the form of forced pregnancy or organ extraction. This privacy right terminates, however, when the individual is brain dead. Thirty-three states have laws that prevent the removal of life-sustaining medical care from an incompetent pregnant woman even when doing so denies the woman's express wishes stated in her living will.³³² Anti-abortion law is much more intrusive than presumed consent because the latter explicitly provides for the possibility that the individual can easily choose to opt out of organ donation. Presumed consent is merely the default rule, whereas the anti-abortion law overrides the expressed wishes of the individual and her family. Furthermore, when you balance the competing interests at stake, organ donation saves the lives of living human beings, whereas the anti-abortion law protects the potential life of the fetus. A comparison of the two laws leads to the irrational conclusion that Americans value the potential of life more than life itself. With over 79,000 U.S. patients waiting for an organ transplant and 3,000 new patients being added to the waiting list each month,³³³ there is no time like the present to consider a more rational result.

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³³¹ *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 262 (1990).

³³² Rao, *supra* note 115, at 409.

³³³ 25 *Facts About Organ Donation and Transplantation*, Cong. Kidney Caucus, available at <http://www.house.gov/mcdermott/kidneycaucus/25facts.html> (last visited Feb. 16, 2005).